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POWER OF JUDICIARY TO DECLARE VOID IMPROPER EXERCISE OF LEGISLATIVE PREROGATIVE TO DISTRICT A STATE INTO ITS POLITICAL SUBDIVISIONS.

Some weeks ago we had occasion favorably to comment upon the recent decision of the Kentucky Court of Appeals in the case of Ragland v. Anderson, 64 Cent. L. J. 362, holding that the legislative fiat is not all that is necessary to sanction an exercise of its power to district a state politically, and that where this is done so unequally as to do violence to every possible mathematical calculation and to work great inconvenience and injustice on some districts and in favor of others, the courts have the power to interfere and hold the legislature to a constitutional exercise of its powers in this respect.

Believing as we do, and as we so expressed ourselves in the citation above referred to, that the decision of the Kentucky Court of Appeals is strictly in accordance with the soundest principles of constitutional construction, we cannot but believe that that very able tribunal, the Supreme Court of Tennessee, has committed error in its recent decision in the case of Maxey v. Powers, 101 S. W. Rep. 181. It appears from the facts in that case that section fifteen, article six, of the Tennessee constitution declares that the different counties of the state shall be laid off, as the general assembly may direct, into districts of convenient size, each one to have two justices of the peace and a constable. Notwithstanding this provision of the state constitution, the Supreme Court of Tennessee holds in the recent case above referred to that an act of the legislature abolishing certain districts of Knox county and redistricting the county, is not invalid, notwithstanding the districts as laid off in the statute are disproportionate in area, wealth, and population, and of shape inconvenient to their inhabitants, since the power to create the districts is vested in the legislative department, and its action in such respect is conclusive.

In its decision in the principal case, divesting itself of any authority to declare void an act of its own legislature fixing the limitations and boundaries of a political district or subdivision, the Supreme Court of Tennessee has the following to say: "Counties and civil districts are essentially political divisions and subdivisions of the state, created for public and political purposes; that is, convenience in the administration of the law and the exercise of the functions of the state. The former are *quasi* corporations, having such powers as have been delegated to them by the general assembly, which they hold at its pleasure, chief of which is the power of legislating upon certain local matters, lodged in a body created by the legislature, composed of the justices of the county. The latter are, as said, mere territorial districts, with no powers. The power to create them, then, it is obvious, is vested in the legislative department of the state. Whether it is inherent in the general assembly, or is vested in it by article 6, § 15, of the constitution, is immaterial. It is, we think, from whatever source it may be derived, a political power, the exercise of which is intrusted solely to the judgment and discretion of the general assembly, and when it has exercised this discretion its action is final, and its correctness cannot be challenged by either of the departments of the government. This, we think, is in substance and effect held in the cases decided by this court sustaining special statutes enacted for the purpose of redistricting several counties of the state. Redistricting Cases, 111 Tenn. 241, 80 S. W. Rep. 750; State v. Akin, 112 Tenn. 603, 79 S. W. Rep. 805; State v. Hamby, 114 Tenn. 361, 84 S. W. Rep. 622. The general assembly had the exclusive and absolute power to lay off Knox county into civil districts. How it should execute this power was for it to determine. It must be assumed that it had the proper data and information before it to do so intelligently, and that the districts created by it are of convenient size for their primary purpose, the efficient administration of the law in the county, and also in the interest and for the good of the people affected. The courts have no jurisdiction to inquire into these matters, and the civil districts must stand as laid off by the act, until it is repealed or amended by the legislature."

Contrast this confession of judicial impotency with respect to questions of political dis-

tricting by a legislature with the virile utterance of the Kentucky Court of Appeals, *supra*, claiming its prerogative under the constitution to compel the legislature of Kentucky to keep within a proper exercise of its powers in redistricting the political subdivisions of that state and requiring that it divide them on a basis of some apparent equality in accordance with the constitution of that state. The constitution of Tennessee requires that in laying off a county into its political districts, the legislature shall make all the districts of convenient size. If this constitutional limitation is not to be rendered absolutely nugatory by the surrender of the state judiciary of Tennessee of their power to enforce it, it would seem to give the right to the courts of Tennessee to declare void an act of the legislature which parcels out the districts of a county with absolutely no regard to the convenience of the inhabitants.

We fear that courts of the present day are too much inclined to run away from political questions or else to decide them without disentangling themselves from their own political prejudices. We believe, however, that the people would have greater faith in our judiciary if they would arise to the occasion on political questions and decide them, without fear or favor, in accordance with strict principles of law and justice. The people need protection from vicious legislation, political as well as non-political. Indeed, some of the most important rights of the people are political in their nature and if the courts do not protect them in their exercise of them, where will the people go for succor? Under such circumstances our government becomes an oligarchy of the majority, just as vicious an absolutism when unchecked in its mad rush for domineering supremacy over the minority, as any other oligarchy. When we consider that in all such political questions, it is the minority rather than the majority which seeks the protection afforded by a constitutional restraint upon the majority, it becomes evident at once that for a court to confess weakness at such a crisis is to be recreant to a most sacred obligation, and results in thoroughly disappointing the petitioner at the bar of justice whose political rights have been ruthlessly denied him and causing him to lose faith in the justice and efficacy of our republican institutions.

NOTES OF IMPORTANT DECISIONS.

PRINCIPAL AND SURETY — DISCHARGE OF SURETY BECAUSE OF FAILURE OF OBLIGEE TO NOTIFY SURETY OF PRINCIPAL'S PREVIOUS IMPROPER CONDUCT.—Must the obligee of a bond, coincident with its execution, tell the sureties procured by the principal all he knows about the latter's improper conduct in relation to the business or subject-matter secured by the undertaking? This is the very important question which the Supreme Court of Tennessee answers in the affirmative in the recent case of Hebert v. Lee, 101 S.W. Rep. 175, where that court held that the failure of plaintiff, who required an agent to execute a bond for the performance of his duties, to inform the sureties of the agent's previous embezzlement of funds obtained as his agent, operates to release the sureties from liability, though the obligee had no communication with the sureties, but the bond was presented to them for signing by the agent, and the bond recited that the sureties became liable not only for debts that might be incurred by the agent after its execution, but for such moneys as he might at the time owe by reason of transactions as agent.

The court bases its decision in the principal case on the important principle laid down in the great leading case of Phillips v. Foxhall, L. R. 7 Q. B. 666. The court said: "We think there can be no doubt that the mere failure upon the part of the complainant to inform these sureties of the fact that their principal (Lee) had fallen behind from time to time in his accounts as agent, until his liabilities had amounted at the execution of these two bonds to the sums stated, would not be sufficient to relieve them from liability. If the present case were that—in other words, if this were a case in which the agent was simply behind in his accounts, and the complainant had failed to communicate, in the absence of investigation or inquiry upon the part of the sureties, this fact to them—we think this would not constitute a ground for resisting a recovery on these bonds. But the court of chancery appeals does not leave the case in that condition. That court finds, in words which admit of no other construction, that at the time of the execution of these several bonds Lee's liabilities grew out of the embezzlement of his principal's funds, and that he was at each of these dates a 'defaulter' within the knowledge of complainant. We think, upon this finding of facts, that a failure upon the part of the obligee to communicate the criminal conduct of Lee, out of which the existing indebtedness occurred, at the time of the making of these bonds, to the sureties upon them, although not inquired of by the sureties, was such conduct on his part as to relieve the sureties from liability. This principle, which it seems to us rests in sound morals, has been announced in many cases, the leading one of which, possibly, is that of Phillips v. Foxhall, L. R. 7 Q. B. 666. This case rested for authority, in part, upon Smith v. Bank of

Scotland, 1 Dow, 272. In the course of the opinion delivered in the house of lords in that case, Lord Eldon said: 'If a man found that his agent had betrayed his trust, that he owed him a sum of money, * * * if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing or having ground to believe that he was not, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent.'"

The decisions of the courts of this country have as a rule followed the rule laid down in Phillips v. Foxhall, and that authority is unquestioned. Thus, in State v. Sooy, 39 N. J. Law, 135, it was held "that a party taking a bond for the future good conduct of an agent already in his employment must communicate to his security his knowledge of the past criminal misconduct of such agent in the course of such past employment, in order to make such bond binding." In Dinsmore v. Tidball, 34 Ohio St. 411, the action was upon the bond to indemnify the Adams Express Company against loss for the dishonesty or unfaithfulness of an agent. The agent was at the time in the employ of the company, and had been guilty of acts of embezzlement, which fact was not communicated to the surety. In disposing of the question raised by the surety upon this state of facts the court said: "Admitting that a principal, in accepting a guaranty for the faithful and honest conduct of his agent, is not bound under all circumstances to communicate to the guarantor every fact within his knowledge which increases the risk, yet we think that there can be no doubt, either upon principle or authority, that, when an agent had acted dishonestly in his employment, the principal, with the knowledge of the fact, cannot accept a guaranty for his future honesty from one who is ignorant of the agent's dishonesty, to whom the agent is held out by the principal as a person worthy of confidence. The failure to communicate such knowledge under such circumstances would be a fraud upon the guarantor." In Charlotte, Columbia & Augusta R. R. v. Gaw, 59 Ga. 685, 27 Am. Rep. 403, it was held, in applying the principle in favor of a surety where the dishonesty of the agent was discovered subsequent to the making of the bond, and yet was not communicated to the surety, that such agent, "being under bond to account and pay over daily, cannot be trusted with more money at the sureties' risk after dishonesty of the agent had been discovered by the corporation, but may be so trusted so long as the circumstances, fairly interpreted, do not point to moral turpitude, but to a want of diligence and punctuality, rather than to a want of integrity." The same principle is recognized as being eminently sound in Saint v. Wheeler, etc., Mfg. Co., 95 Ala. 362, 10 So. Rep. 539, 36 Am. St. Rep. 210; Roberts v. Donovan, 70 Cal. 108, 9 Pac. Rep. 180, 11 Pac. Rep. 599; Atlantic, etc., Telegraph Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Newark v. Stout, 52 N. J. Law, 35, 18 Atl. Rep. 943. The rule is otherwise if the acts of the agent, undisclosed to his surety, do not involve moral turpitude, but are such as are consistent with honesty, and only tend to show that the agent is negligent, dilatory, or unskilled. In such case the law does not impose the duty upon the obligee, unasked, to give the surety information of such facts. This distinctive principle is recognized in Screwmen's, etc., Assn. v. Smith, 70 Tex. 168, 7 S. W. Rep. 793; Atlas Bank v. Brownell, 9 R. I. 169, 11 Am. Rep. 231; Home Insurance Co. v. Holway, 55 Iowa, 571, 8 N. W. Rep. 457, 39 Am. Rep. 179; Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196; Domestic Sewing Machine Co. v. Jackson, 15 Lea, 418.

One of the important considerations pressed earnestly by counsel to the court's attention, was the fact that the plaintiff in the principal case, the obligee in the bond, did not know the sureties, lived at a distance from them, had no communication whatever with them, and did not, by word or suggestion, solicit or encourage the execution of the bond sought to be enforced in this case. The court, however, failed to see anything in this phase of the admitted facts in this cause to change the effect of the application of the general rule already announced. On this point the court said: "It is true, as has been stated, that the complainant had no communication with the sureties upon these bonds, and that they were presented to and signed by them at the instance of Lee, their principal; yet we think this fact does not prevent them from availing themselves of the principle announced in Phillips v. Foxhall, *supra*, and the other cases to which reference has been made. The bonds were sent out by the complainant to Lee in order that he might obtain sureties upon them, and we can see no distinction between this case and one where the obligee personally presents the bond to the surety and obtains his signature to it, knowing at the time that the agent has been guilty of criminal offense theretofore in the management of his agency, and fails to communicate the fact to the surety. The presentation of the bond, without more, is an implied assurance, at least, that the agent has been guilty of no criminal delinquency in the management of the affairs of his agency; and we think the surety is as well discharged in the one case as in the other, if without any knowledge of the existence of such default he signs the bond."

THE POWER OF A COURT TO COMPEL A PLAINTIFF IN A SUIT TO SUBMIT TO A PHYSICAL EXAMINATION.

An ever increasing number of personal injury cases are demanding the attention of our courts and juries. In cases of this nature, the question of the extent of the injury is of vital importance, and all means which will aid a court or jury in arriving at a correct estimate of the same, are of interest to the profession at large. The question as to whether, and under what circumstances, courts will order the physical examination of litigants, in view of ascertaining the extent of their injuries, is a much mooted one. In this article we will examine some of the important decisions *pro* and *con* upon this question, with a view of determining the better rule.

At Common Law.—It is vigorously asserted by the courts, in several of the decisions holding adversely to the power of the courts to order a physical examination, that such power was unknown to the common law and never exercised by any of the English common law courts.[1] While it is true that there is no decision in the early books where this power was exercised by the court in a personal injury case, yet, it was held at a very early date that this power of ordering a physical examination, existed in cases somewhat similar to personal injury cases. Justice Blackstone states that in a case of mayhem the court might order a physical examination to ascertain whether the crime as charged had been committed or not,[2] and it was well settled at an early date that in cases of divorce, where the impotency of either party was charged, as a ground therefor, that the court might order a physical examination to ascertain facts which were essential to a proper decision of the causes.[3] It is very evident from a reading of the early cases, that the right of the court to inform itself as to the extent of the injuries, and physical condition of the parties seeking redress before it, was derived from the principle that justice is the object of all judicial investigation, and that courts charged with its administration had, as a necessary means of attaining that end, an inherent power to require the production of the most certain and infallible evidence.

Decisions Holding That Court Has Such Power.—In the case of Beckwith v. New Cent. R. Co.,[4] the Supreme Court of New York held, that, in a personal injury case, it was not erroneous for the judge to charge the jury that the defendant had it in his power to examine the actual condition of the plaintiff before trial; this was in the year 1865 and is the earliest expression of the rule in this country; this rule was followed in the state of New York until the year 1883 when the former holdings were repudiated by the supreme court of that state, and it was held that the power of the court to order a physical examination did not exist.[5] In Missouri, the course and history of judicial opinion on the subject has been precisely the reverse of that exhibited in New York. The Supreme Court of Missouri first held, that "the proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law." Afterwards this decision was seceded from, and the doctrine thoroughly established in that state, with the modification, however, that such examination is a matter of discretion with the court, the exercise of which will not be interfered with unless manifestly abused.[6] In an Arkansas case[7] the court uses the following language: "Where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of the surgeon upon his condition—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion; and its

[1] Union Pac. R. Co. v. Botsford, 141 U. S. 250, 35 L. Ed. 734; McQuigan v. D. L. & W. R. Co., 129 N. Y. 50, 14 L. R. A. 466, 26 Am. St. Rep. 507.

[2] 3 Blackstone's Com. 332; 2 Rolle, Abr. 578.

[3] Devenbagh v. Devenbagh, 5 Paige, 554, 3 L. Ed. 827; C. v. C., 32 L. J. Mat. 12; B. v. L., 16 Week. Rep. 943. See authorities collected in note to 14 L. R. A. 466.

[4] Beckwith v. New York Cent R. Co., 64 Barb. 299.

[5] Walsh v. Sayre, 52 How. Pr. 334; Shaw v. Van Rensselaer, 60 How. Pr. 143, overruled in Roberts v. Ogdensburgh & L. C. R. Co., 29 Hun, 154. This right of examination now exists in New York by statute. Ch. 721, Laws 1893. Sec. 873, Code Cor. Prac.

[6] Loyd v. H. & St. J. R. R. Co., 53 Mo. 509, overruled in Shepard v. Mo. Pac. R. Co., 85 Mo. 629; Owens v. K. C., St. J. & C. B. R. R. Co., 95 Mo. 165, 4 Am. Neg. Cas. 590.

[7] Sibley v. Smith, 46 Ark. 275.

action is subject to review in case of abuse." To the objection advanced against the exercise of this power, that the same is a violation of the personal right of privacy and a violation of the feelings of a litigant, the Supreme Court of Alabama says: "The fact that she (plaintiff) was of a nervous temperament, or in a nervous condition, involved no tenable objection. * * * Her delicacy and refinement of feeling, though of course, entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand, and possible injustice to the defendant, on the other, the law cannot hesitate; justice must be done. * * * The result of such examination by skilled and disinterested surgeons, under the directions of the court, would necessarily have been, either, to put the plaintiff's claim in this regard on impregnable ground, or to have destroyed it altogether; and in either case, there would have been an unquestioned assurance that justice had been done."[8]

A recent decision of the Supreme Court of Indiana goes fully into the question as to the right of physical examination.[9] In that case the defendant filed a verified motion, averring that it had had no opportunity to examine the plaintiff, before trial, that plaintiff would call physicians who would testify in his behalf in regard to his injuries, and that plaintiff alleged in his complaint various injuries which were of a permanent nature. The lower court refused to grant defendant's motion for a physical examination; on appeal to the supreme court, Justice Baker in reversing the case said: "The overruling of this motion presents a question of some difficulty, and upon which the courts of the country are not entirely agreed. It is one, too, that has but recently engaged the attention of the courts of last resort. The fundamental principle, however, is an ancient doctrine of the common law, limited it is true, to a few classes of cases, wherein impo.ency is charged; but as the sources of evidence have been extended to parties and in many other ways, its application has been expanded to meet new conditions. * * * Courts are instituted by the state to administer impartial justice to contending parties. In such contests it is the duty of the court to bestow upon the litigants equal and exact justice. This cannot be done without the court first obtaining the exact and full truth concerning the matters in controversy. Hence from this duty of the court to dispense exact justice is essentially implied all power necessary to its performance, which includes the power to make, subservient to its orders, all persons and things that will afford the most reliable evidence. * * * That the question embraces the evidence of scientific knowledge makes no difference. Physicians and surgeons, however honest and learned, are fallible, and equally, with other honest and honorable persons, subject to the unconscious influence of friendship and personal interest—the latter in surgery cases, involving not only professional reputation, but pecuniary liability. Besides, surgeons of equal learning and honesty may not diagnose an injury in the same way. They may not be equally strong in perception, or equally accurate in observation, or in measurements, and thus form different judgments of the existing conditions, which of necessity must constitute the basis of their scientific opinions, and it may be readily seen that if a defendant must make his defense against the expert opinions of the plaintiff's chosen surgeons, without an opportunity of testing the verity of the basis of such opinions, he may be placed at disastrous disadvantage such as the law cannot and does not sanction. * * * The discretion lodged in the trial court, as fairly deducible from the decisions, is a sound discretion based solely upon legal considerations. When serious and permanent injuries are claimed by the plaintiff, and he, or she, has submitted to examination by a chosen physician or a surgeon, who appears as a witness in plaintiff's behalf, and the nature, extent, and effect of the injury is to be deduced from objective conditions, and so fully from no other source, no degree of sentiment will justify a denial of the motion." In Illinois the supreme court in the year 1882 in the case of Parker v. Enslow,[10] in considering

[8] Alabama Great Southern Railroad Company v. Hill, 90 Ala. 71, 9 Am. Neg. Cases, 11.

[9] City of South Bend v. Turner, 156 Ind. 418, overruling Pen. Co. v. Newmeyer, 129 Ind. 401.

[10] Parker v. Enslow, 102 Ill. 272.

the question of the power to order a physical examination, dismissed the subject with the assertion that "the court had no power to make or enforce such an order," but in subsequent decisions, while not expressly overruling the Parker case, the courts of that state recognize the existence of the power when properly and timely invoked.[11] The states of Georgia, Iowa, Kansas, Kentucky, Minnesota, Nebraska, Washington, Ohio, Pennsylvania, Texas, and Wisconsin have reasserted the rule as originally announced in the state of New York in the Beckwith case.[12]

Decisions Holding Against the Power.—The leading case holding against the right of the courts to order a physical examination of a litigant is the case of Union Pac. R. Co. v. Botsford,[13] decided by the Supreme Court of the United States in 1891. Mr. Justice Gray, speaking for the court, there said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. * * * The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an insult and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." Following the rule as laid down in the Botsford case, the Supreme Court of Massachusetts has denied the power of a court to compel a plaintiff to submit to a physical examination. The court said: "We agree that in view of the great increase of actions for personal injuries, it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we are careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight unto the present wants of society. But the improvements made by the courts are made almost invariably, by very slow degrees and by very short steps. Their general duty is not to change, but to work out, the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain. No one supposes that this court might have anticipated the legislature by declaring parties to be competent witnesses any more than to-day it could abolish the requirement of consideration for a simple contract. In the present case we perceive no such pressing need of our anticipating the legislature as to justify our departure from what we cannot doubt is the settled tradition of the common law, to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go. It will be seen that we put our decision, not upon the impolicy of admitting such a power, but upon the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case."[14] The case of McQuigan v. Delaware, Lackawanna & Western R. Company,[15] is an interesting

[11] Chicago, etc., R. Co. v. Holland, 122 Ill. 461, 13 N. E. Rep. 145; St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. Rep. 1091.

[12] Richmond, etc., R. Co. v. Childress, 82 Ga. 719, 9 S. E. Rep. 602, 3 L. R. A. 808; Schroeder v. R. R. Co., 47 Iowa, 375; A. T. & S. F. R. Co. v. Thul, 29 Kan. 466, 44 Am. Rep. 90; Belt Electric Co. v. Allen (Ky.), 44 S. W. Rep. 89; Hatfield v. St. Paul, etc., R. Co., 33 Minn. 130, 22 N. W. Rep. 176; Stewart v. Havens, 17 Neb. 211, 22 N. W. Rep. 419; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119; Miami, etc., Co. v. Bailey, 37 Ohio St. 104; Hess v. Lake Shore, etc., R. Co., 7 Pa. C. C. 565; Chicago, etc., R. Co. v. Langston, 19 Tex. Civ. App. 568, 47 S. W. Rep. 1027, 48 S. W. Rep. 610; White v. Milwaukee City R. Co., 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. Rep. 524. But see also O'Brien v. LaCrosse, 99 Wis. 421.

[13] Union Pac. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. Rep. 1000, 35 L. Ed. 734.

[14] Stack v. N. Y. W. H. & H. R. Co., 177 Mass. 155, 52 L. R. A. 328.

[15] 129 N. Y. 50.

one upon this subject. In that case the sole question was as stated by the court "whether the supreme court has power in advance of the trial of an action for a personal and physical injury, to compel the plaintiff on an application made in behalf of the defendant, to submit to a surgical examination of his person by surgeons appointed by the court, with a view of enabling them to testify on the trial as to the existence and extent of the alleged injury." This question is answered in the negative by the court, the rule as announced in the Botsford case being adopted and followed.

In the course of an able opinion delivered by Mr. Justice Andrews, the court said: "The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. * * * It is a significant fact that not a trace can be found in the decisions of the common law courts of England, either before or since the Revolution, of the exercise of a power to compel a party to a personal action to submit his person to examination at the instance of the other party. If the power existed, it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law, and yet, as far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. * * * The power to compel a party to submit to an examination of his person has never been conferred by any statute. It is very clear that the power is not a part of the recognized and customary jurisdiction of courts of law or equity. The doctrine that courts have an inherent jurisdiction to mould the proceedings to meet new conditions and exigencies, is true, but in a limited sense. They cannot, under cover of procedure or to accomplish justice in a particular case, invade recognized rights of person or property. * * * We think the assumption by the court of this jurisdiction, in the absence of statutory authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence."

Waiver of Right to Object to Examination.—There is a scarcity of decision upon the question of waiver of the right to object to physical examination, or exhibition of person, but the reported cases are of one accord that such right to object may be waived. In a Nebraska case;[16] it was held, in a personal injury case, that although a judge of the district court had no jurisdiction, at chambers outside of the country in which the cause was pending, to require plaintiff to submit to a physical examination by the physicians appointed by the judge, yet, such requirement was not reversible error, where plaintiff acquiesced therein, and submitted to such examination without objection. In a Texas case the plaintiff, who was a woman, exhibited her wounded limbs to the jury. Counsel for the defendant afterwards moved the court to require her to exhibit them again for examination by medical experts of their selection, but the motion was overruled. In holding that this was error, Mr. Justice Stephens speaking for the higher court said: "But inasmuch as appellee invited an inspection and examination of her wounded limbs by making profert of them on the trial, we have finally concluded that the case presents a different question from that so often considered, and that its solution should not be influenced by our cherished Anglo Saxon principle of personal security. In our opinion, it would be a perversion of that principle to apply it in a case like this, where the plaintiff, unfortunate and pitiable though she be, voluntarily lays bare before the court and jury her afflicted members for the inspection and examination of the judge, jury, and advocate. For all the purposes of the trial, she thus waived her right to object, upon the ground of an invasion of her right of personal security, to a reasonable and proper examination, under the direction of the court, of the wounded parts. She thus, by her own voluntary act, conferred upon the court jurisdiction to compel what otherwise she might

[16] Ellsworth v. Fairbury, 41 Neb. 881, 60 N. W. Rep. 836.

have refused to submit to. Having conferred the jurisdiction, she could not take it away at pleasure without trifling with the court." The case of Winner v. Lathrop,[17] is an important one bearing upon the question of waiver, coming as it does from a court which has denied the power of the courts to order a physical examination. In holding that the plaintiff had waived his right to object, the court uses the following language: "It seems to me that it would be unfair, and might result in gross injustice to the party against whom such evidence was used. In such a case it would be in the power of the party, by muscular distortion of the injured part, especially an arm or hand, to impose upon the jury and court, as well as the adverse party, and produce upon the minds of the jury a false impression as to the extent of the injury. The member having been put in evidence as a part of the direct examination, it is, for the purposes of the trial, made the property of the court and opposite party for the purpose of a cross-examination. It is difficult to conceive of a species of evidence that is offered by one party in support of his case which may not, in the presence of the same tribunal, be examined and criticised by the party against whom it is offered. We think therefore, that the inspection and examination of this limb should have been ordered and permitted by the court."

Mode of Enforcing Power.—It is admitted by the courts, who refuse to recognize the power of the courts to order a physical examination, that where there is a refusal by a plaintiff in a personal injury case, to exhibit his or her injuries when asked to do so, that, this refusal may be commented on to the jury and considered by them as bearing on the good faith of the litigannt.[18] On the other hand, the courts who recognize this power hold further that such power may be enforced by either striking out the pleadings of the offending party or by delaying or dismissing the proceeding.[19]

Conclusion.—From a thorough review of the authorities upon the subject, the following propositions may be fairly deduced which seem to be supported by a decided weight of authority: 1. The power to order a physical examination by experts of the injured parts of a plaintiff in a personal injury case, exists in the trial courts. 2. That a motion asking such an examination is addressed to the sound discretion of the trial court, no absolute right of examination by defendant exists. 3. That the exercise of that discretion will be reviewed on appeal, and may be corrected in case of abuse. 4. That the examination should be ordered, and had in the direction and control of the court, whenever it fairly appears that the ends of justice require the same, or when more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, are thus obtainable. The examination should not be such as would be painful or dangerous to plaintiff's life or health. 5. The refusal of a motion for an examination, when seasonably made, and when the circumstances present a reasonably clear case for the examination under the rule last stated, is such an abuse of the discretion lodged in the trial court as will operate a reversal of a judgment in plaintiff's favor. 6. The right of a plaintiff to object to a physical examination is a personal one and may be waived. 7. That such an order may be enforced by dismissal, or by striking out or delaying the proceedings.[20]

SUMNER KENNER.

Huntington, Ind.

[17] 67 Hun. 511, 22 N. Y. Supp. 516. See case of Haynes v. Trenton, 123 Mo. 326, 27 S. W. Rep. 622, where it was held to be error to refuse defendant's request to examine a plaintiff's limb after the same had been exhibited to the jury by such plaintiff.

[18] U. P. R. Co. v. Botsford, 141 U. S. 250; Stack v. R. R. Co., 177 Mass. 155, 52 L. R. A. 328.

[19] City of South Bend v. Turner, 156 Ind. 418; Hess v. Lake Shore & M. S. R. Co., 7 Pa. Co. Ct. Rep. 565; Miami & M. Turnp. Co. v. Bailey, 37 Ohio St. 104; 1 Thomp. Trials, sec. 859; 2 Woods Railroads, Minors Ed. (1894), p. 1570; Pierce, Railroads, 298; Black's Law & Practice in Accident Cases, secs. 208-209.

[20] In *quasi* recognition of this however many courts have held that in both civil and criminal cases, weapons, clothings, and wounds upon the person of the parties might be exhibited to the jury. Thrawley v. State, 153 Ind. 375; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801; Hart v. State, 15 Tex. Cr. App. 202, 49 Am. Rep. 188 with note. In 14 Nev. 79, 33 Am. Rep. 530, it was held not to be error to compel the defendant to exhibit tattoo marks on his body. See interesting note in Vol. 2, Bouvier's Law Dictionary (Rawles' Rev.), p. 667.

LIABILITY OF ORIGINAL CORPORATION UPON RE-INCORPORATION.

BAKER FURNITURE CO. v. HALL.

Supreme Court of Nebraska, March 7, 1907.

To render a newly organized corporation liable for the debts of an established corporation or firm, to whose business and property it has succeeded, it should, in the absence of a special agreement to assume such liabilities, affirmatively appear from the pleadings and proofs that the transaction in question is fraudulent as to creditors, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation or partnership are of such character as to warrant the finding that it is a mere continuation of the old firm or corporation.

If the new corporation takes all of the property of the old corporation or partnership, and pays for the same entirely in its stock issued to the stockholders of the old corporation or members of the former partnership, the creditors of the former partership or corporation may enforce their claims in equity against the interests of the former partners or stockholders, and a court of equity will seize such property rights in the hands of fraudulent grantees as in other cases of fraudulent transfer of property, but an innocent purchaser in good faith without notice will be protected. A stockholder in the new corporation may be an innocent purchaser.

BARNES, J.: This is a suit in the nature of a creditors' bill, to charge the Baker Furniture Company with the payment of a debt due from Arthur Shiverick and Ella C. Shiverick, as the Shiverick Furniture Company, to one R. S. Hall. The plaintiff had judgment in the district court, and the defendants brought the case here by a petition in error. By our former opinion (107 N. W. Rep. 117) the judgment of the trial court was affirmed. A rehearing has been had, and the case again demands our consideration. The facts underlying this controversy, briefly stated, are as follows:

In the the month of October, 1899, Arthur Shiverick and Ella C. Shiverick were, and for many years theretofore had been conducting a general retail furniture business in the city of Omaha as copartners, under the firm name and style of Charles Shiverick & Co. At the date mentioned the partnership was indebted to the intervener, Joseph L. Baker, in the sum of $5,700 for borrowed money. The Shivericks at that time represented to Baker that the firm was financially embarrassed; that its assets consisted of a stock of furniture, worth from $12,000 to $15,000, and certain real estate situated in the city of Omaha, of the value of about $7,000; that the obligations of the partnership consisted of $27,000 owing to certain of their relatives, $34,000 to the First National Bank of Omaha, and $6,100 to persons and firms from whom the partnership had bought goods. It was proposed to Baker to form a corporation to be properly financed by him, for the purpose of taking over and conducting the business, and that such a business could be conducted with great profit; and it was represented to Baker that the relatives of Shivericks would forgive the debt due them. The First National Bank was thereupon consulted, and it was ascertained that that institution, in consideration of a cash payment of $5,000 and the execution of new notes to the amount of $10,000 by Arthur Shiverick and Ella C. Shiverick, secured by a mortgage upon certain lands owned by Ella C. Shiverick at San Antonio, Tex., would forgive the balance of its indebtedness. Thereupon Baker and the bank required the Shivericks to make a written statement of the indebtedness of the firm, so that provision could be made to liquidate the same and thus start the business, which was to be taken over and conducted by the proposed corporation, without debt and on a cash basis. This was supposed to have been done, and thereupon it was agreed between Baker and the Shivericks to organize a corporation, to be known as the "Shiverick Furniture Company," with a capital stock of $50,000. The Shivericks were to transfer their stock of furniture, bills receivable, and the Omaha real estate, of the supposed value of about $25,000, to the corporation; and Baker agreed to pay to the Shivericks, or the First National Bank of Omaha, $5,000 in cash, to advance to the Shivericks $5,000 more with which to pay their merchandise indebtedness, together with such other sums as might be necessary for that purpose, and to also advance to Ella C. Shiverick about $1,000, and forgive the debt due him from the firm amounting to something over $5,700 as his contribution to the new enterprise. This arrangement was consummated, and it appears that at the time the corporation was formed all of its capital stock, except 1 share, was issued to the Shivericks; but, in order to carry out the terms of the agreement, 385 shares thereof were immediately transferred to Baker as his share of such capital stock, the remainder being retained by the Shivericks in payment for the property which they transferred to the corporation. The business from that time forward was conducted by Arthur Shiverick as secretary, treasurer, and manager of the corporation; Baker being its president, and Ella C. Shiverick its vice president. To induce Baker to purchase the stock and join in creating the corporation, the Shivericks entered into a contract with him, in writing, whereby they guarantied that he should receive a dividend of 10 per cent. per annum on $25,000 worth of the capital stock so purchased by him, and he in turn gave them an agreement by which they had the right to repurchase all of the capital stock assigned to him in excess of the sum of $25,000 at the price at which it was sold to him at any time within three years after the organization of the corporation. The Shivericks, to secure the fulfillment of this contract, and also as collateral security for individual loans subsequently made to them by Baker, pledged to him stock owned

by them to the amount of $11,500. The business of the corporation, under the management of Arthur Shiverick, was not successful. It appears that no dividends were earned or paid upon the stock. The contract with the Shivericks respecting the payment of their $10,000 in notes to the First National Bank was not carried out by them; no payments at all being made thereon. The result was that suits were brought by the bank against the Shivericks, judgments were recovered, and to protect the credit of the corporation, in which Baker was so largely interested, he was compelled to and did purchase the judgments above mentioned. He thereupon procured an amendment of the articles of incorporation and increased the board of directors, and during the year 1902 took over the management of the business of the corporation, brought suit in the district court of Douglas county upon his claims against the Shivericks to enforce his lien upon the stock held by him as collateral, recovered judgment against them, and had a decree entered for the sale of the shares of stock so held by him as collateral. These shares were sold by the sheriff of Douglas county pursuant to the decree, and were purchased by Baker, who thereupon reorganized the corporation in the name of the "Baker Furniture Company."

It now appears that Richard S. Hall, the plaintiff in the court below, had loaned $6,000 to Arthur Shiverick and Ella C. Shiverick a number of years before the date of the organization of the corporation, and at that time he held their note for that amount. Hall had theretofore been counsel for the Shivericks, and was advised of the facts relating to the formation of the corportion, at the time or within a few days after the transaction occurred. Hall's note was not included by the Shivericks in the statement of their indebtedness made to Baker and the bank, and Baker knew nothing about the matter until more than two years and a half thereafter. Hall testified on the trial of this case that he knew of the organization of the corporation; that he made no effort to procure the payment of his note at that time, because he trusted to the promise of Arthur Shiverick to pay it out of the salary he was to receive as manager of the corporation. However, on the 24th day of May, 1902, some 2 1-2 years ofter the corporation had been organized and the partnership property had been conveyed to it, Hall advised Baker of the fact that he held the note above mentioned, purporting to have been signed by Charles Shiverick & Co. and Arthur Shiverick, on the 14th day of April, 1892, some 10 years before that time, and that the note, with interest thereon for about 2 years, had not been paid. Thereafter Hall brought suit in the district court of Douglas county against Arthur Shiverick and Ella C. Shiverick on said note, and on the same day they appeared in open court, waived the issuance and service of summons, and confessed judgment in his favor for the sum of $6,997.60, as against themselves and as partners doing business under the firm name and style of Charles Shiverick & Co., and agreed that the judgment should bear interest at the rate of 8 per cent. per annum from the date of its rendition. At the January, 1903, meeting of the stockholders of the Shiverick Furniture Company, its articles of incorporation were amended, and the name of the corporation was changed from "Shiverick Furniture Company" to "Baker Furniture Company." On the 23d day of July of that year Hall instituted this suit against the Baker Furniture Company, and recovered judgment as above stated.

It seems clear that the transaction in question herein was not fraudulent as to the creditors of the Shiverick Furniture Company. Indeed, Baker and the bank insisted that all claims against the partnership should be adjusted and settled, and that was one of the conditions on which Baker agreed to become one of the incorporators. It appears that Hall, knowing all about the transaction at or about the time it occurred, failed to inform Baker of the existence of his note, and accepted the promise of Arthur Shiverick to pay the same out of the salary he was to receive from the new corporation. It is true that the Shivericks, who owned the property and business of the copartnership at the time that Baker helped organize the new company, continued thereafter to also have an interest in the business through the stock which they had retained in the corporation. This interest which they had in the copartnership was, of course, an interest in the property of the copartnership, and they still retained and continued to hold an interest in the same property, and Baker is now claiming that it is free from the claim of Hall, who could, of course, have satisfied his claim out of the property while the partnership held it. We think it follows that a court of equity would reach any interest that the Shivericks had in the property at the time the proceedings in equity were begun, and it may be that Baker could not purchase the interest of the Shivericks in the corporate property, so as to be an innocent purchaser for value after he had notice of the outstanding claims of this plaintiff against the property. Montgomery Web. Co. v. Dienelt, 133 Pa. 585, 19 Atl. Rep. 428, 19 Am. St. Rep. 663; Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co. (C. C.), 13 Fed. Rep. 516. It was said in the latter case: "Equity will not compel the creditor of a corporation to waive his right to enforce his claim against the visible and tangible property of the corporation, and to run the chances of following and recovering the value of shares of stock after they are placed upon the market." This, possibly, might depend upon the circumstances in the case. If the court could do complete equity by impounding the shares of stock held by the Shivericks, there would seem to be no necessity of interfering with the property of the corporation. The corporation itself would, of course, be a proper party to such proceedings in equity, and a court of equity should,

in view of all the circumstances in the case, frame its decree so as to do equity to the parties and to make its relief effective.

Since the plaintiff Baker acted in good faith in the formation of the corporation and in investing his money therein, it becomes important to inquire what interest the Shivericks had in this corporate property at the time that Baker had notice of the claims of the plaintiff Hall. This is especially so since the plaintiff purposely failed to notify Baker of his claim against the Shivericks, and allowed him to deal with the Shivericks and with the property in question upon the supposition that all claims against the property had been fully satisfied. There is a conflict in the evidence as to the va'ue of the property which the new corporation took from the Shivericks. There is much evidence tending to show that the total value of all the assets of the Shiverick's copartnership which was taken by the corporation amounted to less than $18,000, and that Baker invested at the time the amount of $17,700, and afterwards paid $1,200 for the judgment against the Shivericks, making a total of $18,900, all of which was done by Baker before he had notice of the outstanding claim of the plaintiff Hall. Whatever the facts may have been in this regard, it is clear that neither at the time that Baker had notice of the claim of Hall, nor at the time that this action was begun, did the Shivericks have any interest in the property of the corporation to the amount of the judgment which was rendered by the court below in favor of the plaintiff Hall. Again, it cannot be said that the corporation assumed and agreed to pay the debts of the partnership; for such debts, as far as they were known or could be ascertained, were either paid or compounded and released before the corporation was formed. So, if the Baker Furniture Company is liable to the plaintiff at all, it is made so because the transaction was merely a continuation of the old partnership of Shiverick & Co.

In our former opinion that fact seems to have been assumed; but we now think the assumption was not warranted by the evidence. An examination of the record discloses that Baker contributed to the new enterprise his own claim of $5,700, $5,000 in cash paid to the First National Bank of Omaha, $5,000 to the merchandise creditors of the firm, together with about $1,000 advanced to Ella C. Shiverick; in all, about $16,700. For this he received what was understood to be his proportionate share of the capital stock of the new corporation. It was Baker's capital which financed the new corporation and brought it into existence. Without such capital the adjustment of such large accounts with the prior creditors of the partnership could not have been made, and no steps could have been taken to further the organization of the new company. Again, the members of the old partnership were Arthur Shiverick, Ella C. Shiverick, and no others; while the new corporation was composed of J. L. Baker, Arthur Shiverick, and Ella C. Shiverick, together with two other persons, who later on became stockholders therein. To this new corporation the old partnership contributed its stock of furniture, its bills receivable, and certain real estate situated in the city of Omaha, for which its members received their proportionate share of the capital stock of such corporation. When the corporation was formed, a new entity was created, which engaged in the furniture business; but it cannot be said that the transaction was in fact a continuation of the old partnership. Paxton v. Beacon Hill and Mining Co., 2 Nev. 257; Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 68 N. W. Rep. 628, 35 L. R. A. 444, 59 Am. St. Rep. 543.

The fact that Baker became the owner of the shares of capital stock issued to the Shivericks, and reorganized the corporation under the name of the "Baker Furniture Company," is strenuously urged as a reason for affirming the judgment of the trial court. It must be remembered, however, that the Shiverick stock was purchased by Baker at a judicial sale; and the rule is well settled that by such purchase he incurred no liability for the debts of either the partnership or the corporation. Armour v. E. Bement's Sons, 123 Fed. Rep. 56, 62 C. C. A. 142; Fernschild v. Yuengling Brewing Co., 154 N. Y. 667, 49 N. E. Rep. 151; Allen v. North Des Moines M. E. Church, 127 Iowa, 96, 102 N. W. Rep. 808, 69 L. R. A. 255, 109 Am. St. Rep. 366; Smith v. C. & N. W. Ry. Co., 18 Wis. 21; Vilas v. M. & O. R. R. Co., 17 Wis. 497; Wiggins Ferry Co. v. Railroad Co., 142 U. S. 396, 12 Sup. Ct. Rep. 188, 35 L. Ed. 1055.

The evidence contained in the record is not sufficient to support the judgment of the district court. Our former judgment is vacated, and the judgment of the district court reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

NOTE.—Herein we observe an application of the familiar principle that the creditor of a copartnership firm has no lien in the true sense of the term upon the partnership assets. His rights are purely derivative and are to be wrought out through the equities of the respective parties. Those equities entitle each of the members of the firm to require the application of the firm assets to the discharge of the firm obligations in preference to those of the individual partners. But when the partners elect to sell the whole or any part of the partnership property to a third party, or to apply it to the discharge of an existing indebtedness of either the firm or one of its members, provided the transaction is not tinctured with *mala fides*, the creditor is without remedy against the property so conveyed. And this is true of all conveyances made before dissolution of the firm even though the copartnership may be insolvent at the time.

Interesting discussions of this doctrine together with numerous citations of precedent from text book authority and courts of last resort may be found in the following cases: Case v. Beauregard, 119 U. S. 99; Sexton v. Anderson, 95 Mo. 373; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426; Reyburn v. Mitchell, 106 Mo. 365. The case also affords an exemplification of the fact that a maxim is a "mighty handy thing to have

around." While not invoked in terms the rule, that "He who did not speak when he should have spoken, shall not be heard, now that he should be silent," evidently exercised a dominating influence in determining the issue of good or bad faith in the sale of the partnership assets and the formation of the new corporation.

BOOKS RECEIVED.

Commentaries on the Law of Contracts. By Joel Prentiss Bishop, LL.D. Honorary Doctor Juris Utriusque of the University of Berne. A New Work Superseding the Author's Smaller One. Second Edition Revised and Enlarged by Marion C. Early, of the St. Louis Bar. Author "Assignments for Benefit of Creditors," in Cyc., Editor Third Edition of "Bishop on Statutory Crimes." Chicago. T. H. Flood and Company. Law Book Publishers. Sheep. Price $6.30. Review will follow.

HUMOR OF THE LAW.

Judge (to lawyer)—"Mr. Sharp, are you defending this prisoner?"

Lawyer—"I am, your honor."

"And how much is he charged with stealing?"

"Fifty dollars, your honor."

"Well, we'll let him go; he'll be punished enough anyhow."

"What do mean, your honor!"

"Why, by the time you get that fifty, and then he works out the other hundred you'll charge him, he'll be sorry enough he ever was dishonest."

A veteran member of the Baltimore bar tells of an amusing cross-examination in a court of that city. The witness had seemed disposed to dodge the questions of counsel for the defense.

"Sir," admonished the counsel sternly, "you need not state your impressions. We want facts. We are quite competent to form our own impressions. Now, sir, answer me categorically."

From that time on he could get little more than "yes" and "no" from the witness. Presently counsel asked:

"You say that you live next door to the defendant?"

"Yes."

"To the north of him?"

"No."

"To the south?"

"No."

"Well, to the east, then?"

"No."

"Ah!" exclaimed the lawyer sarcastically, "we are likely at last to get down to the onereal fact. You live to the west of him, do you not?"

"No."

"How is that, sir?" the astonished attorney asked. "You say you live next door to him, yet he lives neither to the north, south, east, or west of you. What do you mean by that sir?"

Whereupon the witness "came back."

"I thought perhaps you were competent to form the impression that we live in a flat," said the witness calmly, "but I see I must inform you that he lives next door above me."—*Atlanta Constitution.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADMIRALTY—Effect of Appearance in Suit in Rem.—The appearance of the foreign owner of a vessel to claim and release the same when seized in a suit *in rem* does not constitute a general appearance such as to give the court jurisdiction to render a personal judgment against him.—The Lowlands, U. S. D. C., S. D. Ga., 147 Fed. Rep. 986.

2. ALIENS—Chinese Resident Merchants.—In a proceeding to determine the right of a Chinaman to remain in the United States, the fact that he produced no evidence before the collector of customs upon his admission to the United States that he was a resident merchant did not bar its introduction in this proceeding —United States v. Quong Chee, Ariz , 89 Pac. Rep. 525.

3. APPEAL AND ERROR—Alias Summons.—When setting aside the default decree held that the court should have set aside the prior decree striking the case from the docket, and this left plaintiff free to sue out an *alias* summons —Park Land & Imp. Co. v. Lane, Va., 55 S. E. Rep. 690.

4. APPEAL AND ERROR—Application for Rehearing.—But one application for a rehearing can be made by the same party.—Brandon v. West, Nev., 88 Pac. Rep. 140.

5 APPEAL AND ERROR—Bond on Appeal.—Rev. St. 1901, par. 1947, relating to bond on appeal by executor or administrator held not to apply on appeal from an order revoking letters of administration and granting them to another.—*In re* Morale's Estate, Ariz., 89 Pac. Rep. 540.

6. APPEAL AND ERROR — Certiorari.—Omission of the clerk to obey a rule of court in making a transcript held such an omission as might be supplied on suggestion of diminution and issuance of *certiorari*.—Seymour v. Southern Ry. Co., Tenn., 98 S. W. Rep. 174.

8. APPEAL AND ERROR—Denial of Change of Venue.—To warrant the supreme court in overruling the denial of a change of venue for prejudice, the evidence must be convincing and strong enough to overthrow the presumption of the impartiality of the judge.—State v. Smith, Neb., 110 N. W. Rep. 557.

9. APPEAL AND ERROR—Discretion of Trial Court.—While the determination of the court as to opening default is subject to review, the appellate court will not interfere unless the record shows a gross abuse of discretion —Benedict v. W. T. Hadlow Co., Fla., 42 So. Rep. 289.

10. APPEAL AND ERROR—Failure to Instruct.—Where the record does not disclose that any request was made of the court in regard to instructions, its failure to instruct in certain particulars cannot be reviewed on appeal —Howard v. Norton-Morgan Commercial Co., Ariz., 89 Pac. Rep. 541.

12. APPEAL AND ERROR—New Trial.—The supreme court will not reverse an order refusing a trial on the ground that the verdict was contrary to the preponderance of the evidence.—Ruddell v. Seaboard Air Line Ry., S. Car., 55 S.E. Rep. 528.

13. APPEAL AND ERROR—Rights of Individual Creditors in Bankrupt Firm.—Where a commercial firm goes into bankruptcy the right of an individual creditor to be paid by preference out of the individual assets must be enforced in the bankruptcy proceeding.—New Orleans Acid & Fertilizer Co. v. O. Guillory & Co., La., 42 So. Rep. 329.

14. APPEAL AND ERROR—Statement on Appeal.—A statement on appeal filed within 20 days after the denial of motions to strike out and amend the judgment, but nearly a year after the entry of the judgment, should not contain the depositions and testimony introduced on the trial.—State v. Murphy, Nev., 88 Pac. Rep. 335.

15. APPEAL AND ERROR—Unwarranted Delay.—Where there has been an unwarranted delay in a settlement of the statement on appeal from an order striking out the statement on motion for new trial, the trial court is the forum in which to seek redress.—Young v. Updike, Nev., 89 Pac. Rep. 457.

16. APPEARANCE—For Purpose of Removing Cause.—Defendant in a state court does not by special appearance to remove the cause before service of summons, submit to jurisdiction, nor, on removal, deprive himself of the right to object to manner of service.—Clark v. Wells, U. S. S. C., 27 Sup. Ct. Rep. 43.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS—Action to Set Aside Settlement.—Where an assignee for the benefit of creditors is subsequently made administrator of the assignor's estate, the assignor's widow and child are proper parties to bring an action against the assignee to collect amount fraudulentlypaid out by the assignee.—Adamson v. Donaldson, Ky., 98 S. W. Rep. 1009.

18. ATTACHMENT—Rights of Attaching Creditors.—In the absence of fraud or collusion, an attaching creditor can acquire through his attachment no greater rights to the property than the defendant had when the attachment was levied.—Seward & Co. v. Miller & Higdon, Va., 55 S. E. Rep. 681.

19. ATTORNEY AND CLIENT—Right to Compensation.—Persons who bring about settlement with claimants against coal company directly held liable to the same extent as the company for compensation of attorneys employed by the complainants.—Ingersoll v. Coal Creek Coal Co., Tenn., 98 S. W. Rep. 178.

20. AUCTIONS AND AUCTIONEERS—Liability of Purchasers.—An adjudicatee at public auction who has been condemned to comply with the terms of the adjudication must pay interest on the credit portion of the price, represented by his notes.—Tobin v. O'Kelly, La., 42 So. Rep. 258.

21. BANKRUPTCY—Appeal.—Allowance on appeal from a circuit court of appeals in bankruptcy case on certificate of justice of supreme court held not an adjudication that an appeal is taken within the time allowed by general order in bankruptcy No. 36.—Conroy v. First Nat. Bank, U. S. S. C., 27 Sup. Ct. Rep. 50.

22. BANKRUPTCY—Jurisdiction of State Courts.—Under Bankr. Act, July 1, 1898, ch. 541, §§ 24b, 25a, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432], supreme court of territory held to have no jurisdiction of proceedings for review of order refusing to vacate adjudication of bankruptcy.—*In re* American Copper Co., Ariz., 89 Pac. Rep. 516.

23. BANKRUPTCY — Preferences.—A buyer, receiving goods from a seller and paying for them, held not to receive a preference within the bankruptcy act.—Weeks v. Spooner, N. Car., 55 S.E. Rep. 432.

24. BIGAMY — Prosecution Therefor in Territories.—A prosecution cannot be maintained under Pen. Code, § 246, prohibiting bigamy and fixing a punishment therefor, since congress has provided for the punishment of bigamy in the territories.—Territory v. Alexander, Ariz., 89 Pac. Rep. 514.

25. BILLS AND NOTES—Note Payable to Maker.—A note payable to the order of the maker when indorsed and delivered to the indorsee becomes a valid note.—Sherman v. Goodwin, Ariz., 89 Pac. Rep. 517.

26. CARRIERS — Delivery.—A common carrier held bound to make delivery to the consignee if destination is on its lines, otherwise to deliver to the connecting carrier with instructions of the consignor.—Louisville & N R. R. Co. v. Central Stockyards Co., Ky., 97 S. W. Rep. 778.

27. CARRIERS—Interstate Commerce.—Reshipment of stock in cars over the line of a connecting carrier to stockyards in the same city to which the stock was consigned, after it had reached the "break-up" yards of the initial carrier, held not to constitute interstate commerce, though the stock was originally shipped from without the State.—Louisville & N. R. Co. v Central stockyards Co., Ky., 97 S. W. Rep. 778.

28. CARRIERS—Rights of Purchaser of Consignment of Fruit.—Where a consignee of certain fruit sold the same to a second purchaser after a bank had discounted a draft drawn on the first purchaser, the acceptance of payment of the draft from the second purchaser by the bank transferred all its rights to the property to him—Seward & Co. v. Miller & Higdon, Va., 55 S. E. Rep. 681.

29. CHATTEL MORTGAGES—Foreclosure.—The court, in a suit to foreclose a deed of trust executed by an insolvent corporation, held entitled to give the creditors secured thereby relief, though the deed was invalid because acknowledged by an officer, stockholder, and debtor of the corporation.—Foster v. Briggs Machinery & Supply Co., Ind. Ter., 98 S. W. Rep. 120.

30. CONSTITUTIONAL LAW—Delivery of Cars.—Compliance by a carrier with Const. § 213, requiring delivery of cars at points of physical connection with connecting carriers, held not a deprivation of the property of the initial carrier without due process of law.—Louisville & N. R. Co. v. Central Stockyards Co., Ky., 97 S. W. Rep. 778.

31. CONSTITUTIONAL LAW—Due Process of Law.—Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl. cclj], and laws passed in pursuance thereof, subjecting all transportation companies in the matter of their public duties and charges to a corporation commission, held not a denial of the equal protection of the law.—Winchester & S. R. Co. v. Commonwealth, Va., 55 S. E. Rep. 692.

32. CONSTITUTIONAL LAW—Impairment of Contract Obligation.—No contract obligation of a foreign benevolent society held impaired by state statute incorporating a local society with the same name.—National Council, Junior Order of United American Mechanics of United States v. State Council of Virginia, Junior Orderof United American Mechanics of State of Virginia, U. S. S. C., 27 Sup. Ct. Rep. 46.

33. CONSTITUTIONAL LAW — Revival of Judgments.—Laws 1897, p. 52, ch. 39, held not unconstitutional when applied to a judgment rendered in the trial court prior to its enactment, which judgment was affirmed by the supreme court subsequent thereto.—Gaffney v. Jones, Wash., 87 Pac. Rep. 114.

34. CONTRACTS — Termination. — A contract between plaintiff's assignor and defendant railroad company for the operation of a branch line connecting with the coal mines and coking plant of plaintiff's assignor held terminable at the election of the railroad company.—Stonega Coke & Coal Co. v. Louisville & N. R. Co., Va., 55 S. E. Rep. 551.

35. COPYRIGHTS — Extent of Rights Acquired. — The copyrights accorded to publishers held not to authorize them to combine and agree that the sale of their books shall be subject to the rules laid down by the combination.—Mines v. Scribner, U. S. C. C., S. D. N. Y., 147 Fed. Rep. 927.

36. CORPORATIONS—Penalty for Noncompliance With Law Relating to Organization.—Under Civ. Code, tit. 13, §§ 23-166-176 (Laws 1901), relating to the organization of

corporations, and Laws 1903, p. 147, No. 82, providing a penalty for noncompliance with the provisions of the 1901 act, held that the penalty provided applies only to corporations organized under the laws of 1901 or those who elected to come under its provisions.—Rillito Canal Co. v. Schmidt, Ariz., 89 Pac. Rep. 523.

37. CORPORATIONS—Rights of Promoters.—Where promoters of a corporation on learning that F desired stock sent him a blank application which he filled and returned they being original parties in the matter had a right to refuse such application.—Feitel v. Dreyfous, La., 42 So. Rep. 259.

38. COSTS—Motion to Dismiss for Failure to Pay.—Under Rev. St. 1901, par. 1551, a written motion to dismiss for failure of a nonresident plaintiff to give security for costs need not be verified.—Union Iron Works v. Veko IMin. & Mill. Co., Ariz., 89 Pac. Rep. 539.

39. COUNTIES—Settlement with County Attorney.—Report of settlement with county attorney filed by commissioners appointed by fiscal court held not *prima facie* evidence of the truth of its statements.—Pike County v. Sowards, Ky., 98 S. W. Rep. 1032.

40. COURTS—Previous Decision as Controlling.—Where a question has been settled by the supreme court, it should be treated as no longer open for review unless the evil resulting from the principle established is manifest and mischievous.—Moss Point Lumber Co. v. Board of Suprs. of Harrison County, Miss., 42 So. Rep. 290.

41. COVENANTS—Use of words "Grant" or "Convey."—By the express provisions of Rev. St. 1901, § 728, a conveyance of a fee simple, in which the use of the word "grant" or "convey" is made, impliedly covenants that the estate is free from incumbrance.—Sherman v. Goodwin, Ariz., 89 Pac. Rep. 517.

42. CRIMINAL EVIDENCE—Homicide.—That deceased was not present when defendant and witness on the morning before the homicide had a conversation bearing on the subject held no reason for not admitting it in evidence.—Manning v. State, Tex., 98 S. W. Rep. 251.

43. CRIMINAL TRIAL—Bill of Exceptions.—Where accused's attorneys were guilty of delay in presenting a statement of facts and bills of exceptions, accused was not entitled to a reversal because the court deprived him of a statement of facts and bills of exceptions.—Walker v. State, Tex., 98 S. W. Rep. 265.

44. CRIMINAL TRIAL—Homicide.—In a prosecution for homicide, defendant held not prejudiced by an instruction assuming certain facts as true.—Powers v. State, Tenn., 97 S. W. Rep. 815.

45. CRIMINAL TRIAL—Misconduct of Juror.—A statement by a juror to his fellow jurors, while discussing a case, as to the length of imprisonment imposed on defendant's codefendant, held prejudicial error.—Horn v. State, Tex., 97 S. W. Rep. 822.

46. DEEDS—Conditions Subsequent.—Conditions subsequent in conveyances are not favored, and an unexpressed term will not be imported into such a condition on which to claim a breach.—Wilmore Coal Co. v. Brown, U. S. C. C., W. D. Pa., 147 Fed. Rep. 931.

47. DIVORCE—Drunkenness.—Habitual intemperance as a ground of separation from bed and board short of intoxication, furnishes no ground for such charge.—Schaub v. Schaub, La., 42 So. Rep. 249.

48. DIVORCE—Prior Judgment Bars Evidence Prior to Date of Judgment.—In an action for divorce by a wife, the court will not consider evidence of acts before a judgment of dismissal in a former suit between the same parties on the same grounds, where there was a trial on the merits and no appeal.—Whitney v. Whitney, Neb., 110 N. W. Rep. 555.

49. EMBEZZLEMENT—Pleading Ownership of Property.—An indictment for embezzlement held not insufficient as contradictory in its terms as to the ownership of the property.—Sias v. Territory, Ariz., 89 Pac. Rep. 539.

50. EMINENT DOMAIN—Compensation.—Where land is taken by a railroad company, compensation to be paid is the true market value thereof, and the benefits can only be set off against damages to the residue of the tract.—Morrison v. Fairmount & C. Traction Co., W. Va., 55 S. E. Rep. 669.

51. EQUITY—Petition for Rehearing.—A petition to amend a final decree after petition for rehearing has been denied should be denied, when such petition is in effect a petition for rehearing and is not filed as prescribed by Equity Rule No. 90, and there has been no compliance with such rule and with Rev. St. 1892, § 1452.—Morgan v. Jones, Fla., 42 So. Rep. 242.

52. ESTOPPEL—Authority to Sell for Notes.—Where a sale of land is made by a levee district, and notes taken as a part of the price, the district is estopped from claiming that it could sell for cash only.—Book v. Polk & Goerke, Ark., 98 S. W. Rep. 1049.

53. EVIDENCE—Construction of Railroad Trestle.—An expert may testify that trains running over a trestle will cause spikes driven in the bracing to loosen.—Bundy v. Sierra Lumber Co., Cal., 87 Pac. Rep. 622.

54. EVIDENCE—Demonstrative Evidence.—In probate proceedings held error for counsel for propounder to show jury revocatory words on margin of will and compare them with signature.—*In re* Shelton's Will, N. Car., 55 S. E. Rep. 705.

55. EVIDENCE—Opinion of Physician.—A physician who had attended plaintiff and knew his condition held entitled to testify that in his opinion the fall described by plaintiff would produce the mental condition in which witness found him, etc.—Beard v. Southern Ry. Co., N. Car., 55 S. E. Rep. 505.

56. EVIDENCE—Parol Evidence.—The defense of fraud and want of consideration may be shown by parol to destroy the effect of a written contract.—Minneapolis Threshing Mach. Co. v. Otis, Neb., 110 N. W. Rep. 550.

57. FEDERAL COURTS—Error to State Court.—Whether or not state court exceeded its functions under the state constitution cannot give rise to a question respecting due process of law sustaining the appellate jurisdiction of the Supreme Court of the United States.—Burt v. Smith, U. S. S. C., 27 Sup. Ct. Rep. 87.

58. FIRE INSURANCE—Property Covered by Policy.—In an action on a policy on a two-story brick building with metal roof, and its additions "adjoining and communicating, including foundations, occupied as a steam laundry," held, that the policy included a boiler house.—Guthrie Laundry Co. v. Northern Assur. Co., Okla., 87 Pac. Rep. 649.

59. FRAUD—Intent.—Where a representation concerning the credit of another was honestly made, its actual falsehood did not render the maker liable to an action for deceit.—Barties v. Courtney, Ind. Ter., 98 S. W. Rep. 133.

60. FRAUDS, STATUTE OF—Sale of Standing Timber.—Agreement that plaintiff might remove timber cut, but should relinquish further right to cut timber, held not within statute of frauds.—York v. Westall, N. Car., 55 S. E. Rep. 724.

61. FRAUDULENT CONVEYANCES—Insolvency.—The fact that a chattel mortgagor was insolvent when she made the mortgage did not of itself render the transaction fraudulent and void as to attaching creditors.—Borden v. Lynch, Mont., 87 Pac. Rep. 609.

62. GAMING—Recovery of Amount Lost.—The owner of property which has been lost in a gambling game by his servant, without his consent, can recover it from the winner.—Ramirez v. Main, Ariz., 89 Pac. Rep. 508.

63. GARNISHMET—Assignment of Claims.—Cobbey's Ann. St. 1903, §§ 1531-1534, prohibiting the assignment of claims against servants and other employees for the purpose of garnishment, apply only to residents of the state.—McCormack v. Tincher, Neb., 110 N. W. Rep. 547.

64. HABEAS CORPUS—Control and Custody of Child.—A mother having articled her infant children in Georgia to a stranger, on *habeas corpus* in Florida, the court need not inquire whether the Georgia statute governing apprenticeships has been strictly complied with.—Robertson v. Bass, Fla., 42 So. Rep. 243.

65. HEALTH—County and City Boards.—County held not entitled to recover amount paid city for the treatment of smallpox patients, and city held not entitled to recover balance claimed to be due.—Pulaski County v. City of Somerset, Ky., 98 S. W. Rep. 1022.

66. HOMICIDE—Preventing Escape of Prisoner.—A police officer, having arrested a person for a misdemeanor, held entitled to use such force as was necessary to prevent his escape, even to killing him, though he would not have such right after the person arrested had got away and was fleeing to escape.—Stevens v. Commonwealth, Ky., 98 S. W. Rep. 284.

67. HOMICIDE — Self-Defense.—To constitute self-defense, held not necessary that deceased should have had a pistol concealed in the direction in which he reached, but only that defendant believed there was a pistol.—Puryear v. State, Tex., 98 S.W. Rep. 258.

68. HUSBAND AND WIFE—Deed of Married Woman.—Under Shannon's Code, §§ 3764, 3765, a deed of a married woman executed by an attorney in fact and registered for more than 20 years held valid and admissible in evidence.—Kobbe v. Harriman Land Co., Tenn., 98 S. W. Rep. 175.

69. HUSBAND AND WIFE—Purchase of Real Estate.—A wife paying a part of the purchase price of land purchased by her husband held to acquire a lien on the land for the amount paid.—Moore v. Culley, Ky., 98 S. W. Rep. 1011.

70. INDIANS—Rights of Intermarried Whites in Cherokee Enrollment.—White persons who intermarried with Cherokees after November 1, 1875, held not entitled to share allotment of lands or distribution of funds belonging to such nation.—Red Bird v. United States, U. S. S. C., 27 Sup. Ct. Rep. 29.

71. INDICTMENT AND INFORMATION—Name of Accused.—An indictment naming a defendant as "Charles Foyles, commonly called 'Happy Jack,'" is not bad because of the use of the words "Happy Jack."—State v. Barrick, W. Va., 55 S. E. Rep. 652.

76. INJUNCTION — Municipal Corporations.—Where a city acting under an ordinance with respect to fire limits wrongfully interfered with a property owner in repairing a burned building, held, that an injunction would lie.—Ironside v. City of Vinita, Ind. Ter., 98 S. W. Rep. 167.

73. INTOXICATING LIQUORS — Licensee of Saloon.—A party having no knowledge to the contrary may deal with a person having charge of a saloon licensed to sell liquors, on the presumption that he is the owner and licensee thereof, or the duly authorized agent of such licensee.—Moise v. Weymuller, Neb., 110 N. W. Rep. 554.

74. INTOXICATING LIQUORS—Local Option.—In prosecution for violating local option law, witness held to be examined, though the rule was invoked and she was not placed under the rule.—Sessions v. State, Tex., 98 S. W. Rep. 248.

75. JUDICIAL SALES—Estoppel of Purchaser.—A purchaser at a judicial sale at which certain apparent liens have been deducted in the appraisement is estopped after confirmation without objection to dispute their validity.—State v. Several Parcels of Land, Neb., 110 N. W. Rep. 544.

76. JUDGMENT—Default.—A foreign corporation held entitled to enjoin the enforcement of a default judgment rendered against it in an action in which the summons was served on a third person who was not its agent.—National Metal Co. v. Greene Consol. Copper Co., Ariz., 89 Pac. Rep. 535.

77. JUDGMENT—Default.—When a party claiming a lien on account of detached interest coupons is made a party to foreclosure of the mortgage and makes default, he is barred from foreclosing his coupons when the petition in original suit puts in issue the facts on which he must rely to recover.—Wyman v. Embree, Neb., 110 N. W. Rep. 587.

78. JUSTICES OF THE PEACE—Appeal From Justice Court.—Though a case on appeal from a justice must be tried on the issues tried below, an issuable fact can be pleaded that was not alleged below, if the identity of the cause of action is preserved in the petition.—Jacob North & Co. v. Angelo, Neb., 110 N. W. Rep. 570.

79. JUSTICES OF THE PEACE—Dismissal of Appeal.—A defendant appealing from a justice's judgment is entitled to dismiss the appeal after the introduction of the evidence in the circuit court and while the judge is charging the jury.—C. B. Donaghy & Co. v. McCorkle, Tenn., 98 S. W. Rep. 1050.

80. JURY—Duty to Summon Talesman.—Where 24 jurors on a special venire were not served, the venire consisted only of those who were summoned and were in attendance, so that after they were exhausted it was the court's duty to direct the summoning of talesmen.—Horn v. State, Tex., 97 S. W. Rep. 822.

81. LANDLORD AND TENANT—Lien for Rent.—Where a lessor sues for rent and seizes movables under the writ of provisional seizure, the privilege which he secures does not spring from the seizure, but is a lien granted as of the date of the lease.—Schall v. Kinsella, La., 42 So. Rep. 221.

82. LANDLORD AND TENANT—Notice to Quit.—Notice to quit is not essential to the maintenance of ejectment by a landlord against his tenant after the expiration of the term.—Blocker v. McClendon, Ind. Ter., 98 S. W. Rep. 166.

83. LANDLORD AND TENANT—Leased Premises.—A clause in a lease attempting to create a lien on the crops to be raised is ineffectual to create either a legal or equitable lien on the crops grown thereafter on the leased premises.—Thostesen v. Doxsee, Neb., 110 N. W. Rep. 567.

84. LIMITATION OF ACTIONS—Mortgage Foreclosure.—Where a third person acquired an interest in mortgaged property under tax deed she could invoke the statute of limitations as against the mortgagee, though it may have been waived by, or not available to, the mortgagor.—Graves v. Seifried, Utah, 89 Pac. Rep. 674.

85. MALICIOUS PROSECUTION—Probable Cause.—In an action for malicious prosecution, whether there was probable cause for the prosecution is a question of law for the court to determine, where the facts are admitted.—Richardson v. Powers, Ariz., 89 Pac. Rep. 542.

86. MARSHALING ASSETS AND SECURITIES—Applicability of Doctrine.—The doctrine of marshaling assets held to apply where one attaches part only of the grain on which there is a landlord's lien, and notifies the landlord.—Wolfe v. Houston Land & Irrigation Co., Tex., 98 S. W. Rep. 1069.

87. MASTER AND SERVANT—What Knowledge is Resumed.—It is error to hold as a matter of law that an employee 24 years old, of average intelligence, is chargeable with knowledge that to throw a bucket of water into a fire box of a smelting furnace, containing a bed of highly heated coals, is liable to result in a dangerous explosion.—Malone v. American Smelting & Refining Co., Neb., 110 N. W. Rep. 572.

88. MASTER AND SERVANT—Care Required of Servant.—Where a railroad conductor was injured by falling down the steps of a depot platform at nightt, he railroad company's negligence in failing to light the platform did not absolve him from the obligation of using ordinary care.—Beard v. Southern Ry. Co., N. Car., 55 S. E. Rep. 505.

89. MONOPOLIES—Agreement in Restraint of Trade.—An agreement by a publishers' association not to sell to any one who cut prices on copyrighted books held a conspiracy in restraint of interstate trade or commerce.—Mines v. Scribner, U. S. C. C., S. D. N. Y., 147 Fed. Rep. 927.

90. MUNICIPAL CORPORATIONS—Defective Streets.—In an action against a city for personal injuries plaintiff must show negligence of defendant, with nothing establishing contributory negligence on his part, but the burden is on defendant to affirmatively show such contributory negligence.—Oklahoma City v. Reed, Okla., 87 Pac. Rep. 645.

91. MUNICIPAL CORPORATIONS—Obstructions in Street.—Where a boy 10 years old was walking at night and was frightened by dogs, and ran into a street, and came into contact with machinery negligently left there by defendant's employees, defendant would be liable.—Maronne v. Keegan, La., 42 So. Rep. 212.

92. MUNICIPAL CORPORATIONS—Pedestrian's Exercise of Due Care.—Whether a traveler exercises the proper degree of care, knowing of the defect in a street, is a question for the jury.—Nicholson v. City of Omaha, Neb., 110 N. W. Rep. 558.

93. MUNICIPAL CORPORATIONS — Tax Assessment.—Omission by a city assessor to to take the statutory oath before making an assessment does not invalidate the assessment.—Blades v. City of Falmouth, Ky., 98 S. W. Rep. 1017.

94. NEW TRIAL—When Notice of Intention Must be Given.—Notice of intention to move for new trial in injunction suit tried by court with jury may be given within 10 days after receiving written notice of the decision of the judge, and his statement may be filed within 5 days after giving notice.—State v. Murphy, Nev., 88 Pac. Rep. 335.

95. PARENT AND CHILD—Emancipation.—The offer of a parent to give his child a share in the crop he might raise on the parent's farm does not operate as an emancipation of the child.—Smith v. Gilbert, Ark., 98 S. W. Rep. 115.

96. PARTNERSHIP—Acquiring Title Adverse to Firm.—A member of a partnership formed to purchase and sell land held not entitled to renew expiring options held by the firm for his own benefit, or to exclude his partners from participation in the profits obtained by such transaction.—Gaddie v. Mann, U. S. C. C., S. D. Ga., 147 Fed. Rep. 960.

97. PRINCIPAL AND AGENT—Liability of Agent to Third Persons.—A firm of marine insurance agents, known to be such by one employed to render services in behalf of the insurers in releasing a stranded vessel, cannot be held personally liable to pay for such services in the absence of an agreement expressly binding themselves.—Great Lakes Towing Co. v. Worthington, U. S. D. C., N. D. N. Y., 147 Fed. Rep. 926.

98. PRINCIPAL AND AGENT—Power of Attorney.—An interest in the property of which a power is to operate held essential to make a power of attorney one coupled with an interest so as not to be subject to revocation.—Taylor v. Burns, U. S. S. C., 27 Sup. Ct. Rep. 40.

99. PROCESS—Proving Return False.—Under Rev. St. 1901, par. 1098, a sheriff's return of service of summons may be shown to be false without proving that the false return was procured by the fraud of plaintiff.—National Metal Co. v. Greene Consol. Copper Co., Ariz., 89 Pac. Rep. 535.

100. PROCESS—Summons. — The absence of the seal from the summons and the omission from the præcipe of a statement of the nature of the action are amendable defects.—Benedict v. W. T. Hadlow Co., Fla., 42 So. Rep. 239.

101. QUIETING TITLE—Dismissal of Bill.—Where demurrer to a bill for removal of cloud is sustained and a restraining order dissolved, and a further order made on rehearing, reciting that complainant shows that he is not entitled to the relief sought because of defects in his title, the bill was properly dismissed.—Morgan v. Jones, Fla., 42 So. Rep. 242.

102. QUO WARRANTO—Corporations.—To procure a decree enjoining a corporation from acting as such on the ground of nullity of its organization it is not necessary that individual officers be made defendants, but the state may bring such an action against the corporation alone.—State v. Inner Belt Ry. Co., Kan., 87 Pac. Rep. 696.

103. RAILROADS—Rights Acquired.—Where a railroad company acquires a right of way by use for two years, it also acquires the right to drain such right of way without unnecessary injury to adjoining lands.—Parks v. Southern Ry. Co., N. Car., 55 S. E. Rep. 701.

104. REFORMATION OF INSTRUMENTS—Mistake in Deed.—An alleged latent misdescription in a deed forming a link in a chain of title cannot be corrected where the vendor in such conveyance is not a party to the suit.—Bonvillain v. Bodenheim, La., 42 So. Rep. 273.

105. RELEASE—Fraud.—Where a release pleaded as a defense to an action for injuries was void for fraud, plaintiff held not bound to return the money received as a consideration as a condition to a pleading fraud in the execution of the release.—Hayes v. Atlanta & C. Air-Line R. R., N. Car., 55 S. E. Rep. 437.

106. REMOVAL OF CAUSES—Service by Publication.—Service by publication as prescribed by state statute for nonresidents cannot be had in federal circuit court to which an attachment suit has been removed before service of summons.—Clark v. Wells, U. S. S. C., 27 Sup. Ct. Rep. 48.

107. ROBBERY—Taking by Putting Owner in Fear.—One may be guilty of robbery though he takes the property merely by putting the owner in fear.—Commonwealth v. Titsworth, Ky., 98 S. W. Rep. 1028.

108. SALES—Consideration.—Where a wholesale dealer receives from a retail dealer a written order for goods at a specified price, and the goods are shipped, the shipping is a sufficient consideration to sustain the contract.—Ziehme v. Parish, Kan., 87 Pac. Rep. 685.

109. SALES—Liability of Seller to Third Person.—A threshing company selling a threshing outfit to a buyer held not liable for breach of contract to a third person, who employed the buyer to do threshing for him.—J. I. Case Threshing Mach. Co. v. Sanford, Ky., 97 S. W. Rep. 805.

110. SCHOOLS AND SCHOOL DISTRICTS—Contract with Teacher.—A contract employing a school teacher is not invalid because the teacher's name was signed thereto by a third person having authority so to do.—Turner v. Hampton, Ky., 97 S. W. Rep. 761.

111. STATUTES—Partial Invalidity.—The act of the state of Tennessee ceding land to the United States for a soldiers' home held not invalid because of the invalidity of a clause thereof concerning the voting privileges of the inmates.—State v. Willett, Tenn., 97 S. W. Rep. 299.

112. TAXATION—Prosecution of Back Tax Suits.—Laws 1903, p. 162, No. 92, construed, and held not to authorize a tax collector of a county to make an irrevocable contract with an attorney for the prosecution of all suits for back taxes as shown by the "back tax book."—McGowan v. Gaines, Ariz., 89 Pac. Rep. 538.

113. TOWNS—Payment of Railroad Bonds.—Railroad bonds of a certain township having been paid off, taxpayers held not entitled to compel county commissioners of the county to invest taxes derived from a railroad company in such township for the payment of such bonds, under Laws 1895, p. 182, ch. 131, § 2.—Jones v. Commissioners of Stokes County, N. Car., 55 S. E. Rep. 427.

114. TRIAL — Argument of Counsel. — Misconduct of counsel in argument, for which he was immediately reprimanded, the objectionable statement withdrawn, and the jury distinctly instructed not to consider or be influenced thereby, held cured.—Texas & N. O. Ry. v. Conway, Tex., 98 S. W. Rep. 1070.

115. USURY—Elements.—The making of periodical settlements between debtor and creditor, the bringing in of new items of debit, and the calculating of interest on past due amounts, held not to constitute usury.—Hamilton v. Stephenson, Va., 55 S. E. Rep. 577.

116. VENDOR AND PURCHASER—Fraudulent Representations.—Where the means of knowledge on a sale of real estate are available to both parties, and the subject of purchase is open to their inspection, the purchaser cannot say in impeachment of the contract for fraud that he was deceived by the misrepresentations.—Long v. Kendall, Okla., 87 Pac. Rep. 670.

117. WITNESSES—Cross-Examination—Though a witness may be cross-examined concerning independent matters tending to impeach his character for truthfulness or general moral character, such investigation cannot extend beyond the witness' denial.—Powers v. State, Tenn., 97 S. W. Rep. 815.